No. 383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ERNEST WALKER SAWYER,
Petitioner,

against

CROWELL PUBLISHING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM I. DENNING,
Solicitor for Respondent

EDWARD V. McKEOWN,
WILLIAM R. COVINGTON,
Of Counsel.

September 7th, 1944.

INDEX

	PAGE
Opinions below	1
Statement	1
Questions presented	6
Reasons for refusing writ	7

Citations

CASES:

U. S. v. Dubilier Condenser Corp., 289 U. S. 178 . . 7, 8, 9

Texas & N. O. R. Co. v. Ry. Clerks, 281 U. S. 548, 558 . . 8

General Pictures Co. v. Electric Co., 304 U. S. 175, 178 . . 8

U. S. Ozone Co. v. U. S. Ozone Co., 62 Fed. Rep. (2d) 881 . . 9

Broome v. Mollé, 20 Fed. Supp. 135 . . 9, 10

STATUTES:

35 U. S. Statutes at Large 1077, 1088, Chap. 320, U. S. C. A. Title 17, Sec. 7 . . 7, 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ERNEST WALKER SAWYER,
Petitioner,

against

CROWELL PUBLISHING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R., 141-145) is reported in 46 Fed. Supp. 471. The opinion of the Circuit Court of Appeals (R., 155-158) is not yet reported.

STATEMENT

The respondent does not agree with the statement of facts contained in the petition, and therefore submits this statement of the evidence on which the decisions of the Courts below were based.

The petitioner, who is a civil engineer, electrical engineer and radio engineer (R., 17) was appointed Executive Assistant to the Secretary of the Interior in March, 1929 and

held that position continuously until March, 1933 (R., 47-48). In June 1929 he was sent on a trip to Alaska in his official capacity (R., 23, 48) and he admits that he went "to make a survey of the facilities that were there under the Department of the Interior" (R., 48). Upon his return he desired a map prepared relating to Alaska, and for this purpose consulted a section chief in the General Land Office of the Department of the Interior, and was referred by him to Wilbur S. Wills, an engineer employed in the Division of Surveys, General Land Office, Department of the Interior (R., 26, 58, 69).

Mr. Wills, who was the only disinterested witness in the case, testified that the petitioner came to him "through official sources" and said that he wished to avail himself of Wills' services in the construction of a map (R., 80). Wills was a cadastral engineer in the Division of Surveys, General Land Office, Department of the Interior (R., 69, 70). The conversation took place in the offices of the Division of Surveys during the usual office hours (R., 80). The petitioner was Wills' superior in the Department of the Interior (R., 73), and both the copyrighted map (Plaintiff's Exhibit 1) and the map which was later republished as Map No. 8 (Defendant's Exhibit B) were prepared in response to the petitioner's *orders* (R., 73, 79, 84). He told Wills that he wanted the map in connection with his work in Alaska, to point out the availability of Fairbanks as a logical site for the location of radio stations and aviation fields, and to accompany his report to the Secretary of the Interior (R., 73, 80).

Wills personally made the mathematical calculations as a basis for the construction of the map and supervised the drafting thereof. The drafting was done in the drafting

section of the Division of Surveys. The drafting consisted of placing upon the map the outlines of the continents and islands and the location of the principal cities (R., 72). The continental outlines were copied from various maps and atlases in the files of the General Land Office (R., 72), the locations of the cities were taken from publications and almanacs on file in the Department of the Interior (R., 73), and Wills used the facilities and equipment belonging to the Government of the United States and available in the Division of Surveys to enable it to fulfill its function of preparing maps for the use of the Department of the Interior (R., 70, 72).

About ten months was required to complete the map (R., 28).

After the petitioner registered the map on April 22, 1930, with claim of copyright, the map was republished on February 1, 1931, and additional matter, consisting of approximately eleven red lines showing mileage distances between certain cities, was included thereon. This is the map referred to herein as Map No. 8. No attempt was made to copyright the further matter added to the copyrighted map when it was republished as Map No. 8.

When Map No. 8 was prepared, Wills computed the distances between the cities connected by the red lines, and the lines were drawn in the drafting section of the Division of Surveys under his direction (R., 74, 75-77).

When the petitioner ordered Wills to prepare the copyrighted map and Map No. 8, he did not tell him that the maps were to become his personal property. He did not pay Wills any compensation for his work or promise to pay him anything, and Wills expected no compensation other

than his salary from the United States Government (R., 84, 103).

The work map Wills used in preparing the copyrighted map and Map No. 8 is an exhibit (Defendant's Exhibit F). All the notations and computations thereon are in Wills' handwriting and there is nothing upon the work map that is in the handwriting of the petitioner (R., 81).

Map No. 8 shows, on its face, that it was engraved and printed by the United States Geological Survey, a bureau of the Department of the Interior, and it is admitted that the copyrighted map was also so engraved and printed (R., 32, 51).

Thus, both the copyrighted map and Map No. 8 were prepared as a Government project, by Government employees hired for the purpose of making maps for the Government, during regular Government business hours, and with the materials and facilities of the Government and the scientific information at its disposal.

When the petitioner placed the legends on Map No. 8:

> "Data obtained from official sources
>
> "The drafting and computations of this map have been verified by the United States Land Office"

he recognized that the map was a Government publication. There is no evidence that the Government verifies privately owned maps.

The petitioner's justification of the legends because of Wills' work on the map (R., 58) is an admission that Wills did the work for the Government and not privately for the petitioner.

In addition, it was described as a Government publication in an official booklet of the Department of the Interior,

published in June, 1931, while the petitioner was Executive Assistant to the Secretary of the Interior (Defendant's Exhibits C, D and E).

The respondent is The Crowell-Collier Publishing Company, the publisher of the magazine "Collier's, The National Weekly". In the issue of that magazine for December 4, 1937, it published the simplified map (Plaintiff's Exhibit 2) claimed to infringe the copyrighted map, in connection with and incidental to an article about the work of aviators in Alaska (R., 86).

Engineers of the Department of the Interior in Alaska gave a copy of Map No. 8 and the Department of Interior booklet to the respondent's staff correspondent while he was on a trip there in 1937 (R., 86-90).

There is no claim that the respondent used the copyrighted map (Plaintiff's Exhibit 1) in the form in which it was registered in the Copyright Office.

The claim is that the respondent used Map No. 8 (Defendant's Exhibit B), which fact is admitted, and by using that map infringed the petitioner's alleged copyright in the copyrighted map.

The map published by the respondent is a copy of portions of Map No. 8 in that it contains (a) the lines and mileage distances, (b) the latitude and longitude of the cities, and (c) the continental outlines shown on Map No. 8. The District Court held that this did not amount to an infringement even assuming that the petitioner's copyright was valid (R., 145, 149). The Circuit Court of Appeals did not consider the matter of infringement for the reason that the question was unnecessary to its decision (R., 158).

It is significant that the petitioner made no effort to sell the map commercially. This shows that he himself consid-

ered the copyrighted map and Map No. 8 to be Government publications.

It is patent that the Government did not recognize the copyright in the petitioner, for in June, 1931, the Department of the Interior published an official booklet entitled "General Information Regarding the Territory of Alaska" (Defendant's Exhibits D and E) in which Map No. 8 was described as a "Department of Interior Publication Relating to Alaska" (Defendant's Exhibit C), as follows:

> "DEPARTMENT OF THE INTERIOR PUBLICATIONS RELATING TO ALASKA
>
> * * * * * * * *
>
> Great Circle Map Showing Fairbanks, the Center of Europe, Asia and America. Map No. 8"

If the Department of the Government in which the petitioner was employed and for which he undertook to make a survey of the facilities of that Department in Alaska, at Government expense and while on the Government payroll, considered the map a Government publication, the respondent was justified in considering it such. The petitioner's acquiescence in the statement made by his Department must be considered an admission on his part of the truth of the fact stated.

QUESTIONS PRESENTED

1. The respondent does not agree with the petitioner's statement of the first question presented, which relates to the nature of the petitioner's employment by the Government as Executive Assistant to the Secretary of the Inte-

rior, and further disagrees with the petitioner's contention that *U. S. v. Dubilier Condenser Corp.*, 289 U. S. 178, is controlling here.

The petitioner's employment referred particularly to Alaska. The Record indicates that he had no other duties (R., 11, 14, 23, 44, 48, 64, 93).

The Courts below did not decide adversely to the petitioner *merely* because of testimony that the map was ordered to accompany a report to the Secretary of the Interior about the petitioner's trip to Alaska in the course of his official duties.

The question presented in this respect is whether an executive employee of the Government, whose duties refer to Alaska, may order subordinate employees of his Government department whose duties consist of making maps, to prepare on Government time and with the use of Government materials and facilities a map which relates to his work in Alaska and is a result thereof, and thereafter claim that he is personally entitled to the copyright therein.

2. Section 7 of the Copyright Act has no bearing on the question presented. No claim is made by the respondent, and the courts below did not find, that the publication of the map by the Government invalidated a previously valid copyright in the petitioner, or constituted an appropriation by the Government of a property right of the petitioner therein.

REASONS URGED BY THE PETITIONER FOR GRANTING THE WRIT

1. The first reason urged is that the decision involves an important question of federal law and is in conflict with

the decision of this Court in *U. S.* v. *Dubilier Condenser Corp.*, 289 U. S. 178.

The facts found by the District Court, and concurred in by the Circuit Court of Appeals, show that that case has no application here.

It is well established that this Court accepts the findings in which two courts concur, unless plainly without support.

> *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 558.

Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.

> *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178.

The decision in *U. S.* v. *Dubilier Condenser Corp.*, *supra*, depended partly on the limited scope of employment of the inventors, and partly on the fact that they personally did the work which resulted in the devices patented. They were employed only to execute specific assignments. Their inventions did not involve and were not suggested by their assignments. On the other hand, in the case at bar the District Court specifically found that the map was prepared as a result of and relating to the petitioner's work in Alaska in the course of his official duties (R., 146). The Circuit Court of Appeals concurred in that finding (R., 157-158).

Also, in the case at bar, the map was prepared, pursuant to the petitioner's orders to his subordinates, by Wills and the drafting section of the Division of Surveys (R., 72, 74-77). Moreover, the petitioner ordered the map prepared "in connection with his work in Alaska" (R., 73, 80). The order was given during the usual office hours (R., 80).

The inventors in the *Dubilier* case could not have claimed title to the patents if the work had been done for them on Government time, with Government facilities, by other Government employees in the Bureau of Standards who had been assigned to problems in that field.

The respondent contends further that the *Dubilier* case does not apply to copyrights. In patent law, the limited rights of an employer are compensated for by the equitable compromise of giving the employer a shop-right in cases where assignment of the patent is not required. This "gives the employer an adequate share in the unanticipated boon." (*U. S.* v. *Dubilier Condenser Corp., supra,* at page 215.) No such doctrine applies in copyright law, and the only protection to an employer who pays for the time and materials consumed, and the facilities used, is to require an assignment of the copyrights.

In copyright law it is clear that when an employee creates something in connection with the duties of his employment, the thing created is the property of the employer, and any copyright obtained thereon by the employee is deemed held in trust for the employer.

The case falls squarely within:

> *U. S. Ozone Co.* v. *U. S. Ozone Co.*, 62 Fed. Rep. (2d) 881;
> *Browne* v. *Mollé*, 20 Fed. Supp. 135.

In *U. S. Ozone Co.* v. *U. S. Ozone Co., supra,* decided by the Circuit Court of Appeals, Seventh Circuit, it is stated, at page 887:

> "We also agree with the findings of the trial court that the copyrighted treatise on the use of ozone in the purification of water in swimming pools

> prepared by Frank E. Hartman while employed by the sterilizer company, though registered in his name, was prepared by him for his employer as part of his duties under his employment, that the sterilizer company became the equitable owner thereof, and that Hartman held the registration in trust for his employer."

In *Brown* v. *Mollé, supra,* decided in the District Court, Southern District of New York, the action was for copyright infringement. The defendant had engaged an advertising agency to put an advertising program on the radio. The plaintiff, who was employed by the advertising agency as production manager for the radio program, concocted a "theme" song for use at the beginning and close of each program.

The plaintiff undertook to copyright the "theme" song in the manner prescribed by the statute, and brought suit when use of the song continued after notice.

Patterson, *D.J.*, dismissed the complaint on the ground that, while the words were the plaintiff's production and copyrightable, the copyright thereon belonged to the advertising agency in trust for the defendant, saying at page 136:

> "The case falls within the rule that where an employee creates something as part of his duties under his employment, the thing created is the property of the employer."

2. The second reason urged by the petitioner for granting the writ is that the Circuit Court of Appeals ignored Section 7 of the Copyright Act, pursuant to which it should have held that the publication by the Government of Map No. 8 did not authorize the use thereof by the respondent.

Section 7 has no application to this case.

There is no reason for construction of the section because the respondent never claimed, nor did the Courts below consider, as evidence against the petitioner, the fact that the Government published Map No. 8.

What the respondent does urge, and what the Courts below did consider, as evidence against the petitioner, is that the petitioner permitted the Department of Interior, in a booklet about Alaska, to describe Map No. 8 as a "Department of Interior publication" and thus an official Government publication (Defendant's Exhibits C, D, E; R., 138-140).

It is further submitted that when matter was added to the copyrighted map and it was republished as Map No. 8 carrying the following legends:

> "Data obtained from official sources
>
> "The drafting and computations of this map have been verified by the United States Land Office"

the petitioner himself recognized that the map was a Government publication.

It was these admissions against interest that were considered, and not the fact that the Government published the map.

WHEREFORE, it is respectfully submitted that the petition should be refused.

WILLIAM I. DENNING,
Solicitor for Respondent

EDWARD V. MCKEOWN,
WILLIAM R. COVINGTON,
Of Counsel.

September 7th, 1944.